



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 812, 813, 852, and 853

RIN 2900-AP58

VA Acquisition Regulation: Acquisition of Commercial Items and Simplified Acquisition Procedures

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, VA will publish them in the Federal Register. In particular, this rulemaking revises the VAAR concerning Acquisition of Commercial Items and Simplified Acquisition Procedures, and affected parts Solicitation Provisions and Contract Clauses, and Forms.

DATES: This rule is effective on [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington DC 20001, (202) 382-2787. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 11, 2018, VA published a proposed rule in the Federal Register (83 FR 1321) which announced VA's intent to amend regulations for VAAR Case RIN 2900-AP58 (parts 812 and 813). VA provided a 60-day comment period for the public to respond to the proposed rule and submit comments. The comment period for the proposed rule ended on March 12, 2018 and VA received comments from a total of five respondents. This rule adopts as a final rule, with changes, the proposed rule published in the Federal Register on January 11, 2018.

This final rule adds language to VAAR part 812 to state that VA's Veterans First Contracting Program (VFCP) under VAAR subpart 819.70 applies to VAAR part 812, Acquisition of Commercial Items; to update a list of unique VA solicitation provisions and contract clauses that contracting officers can apply to solicitations and contracts for the acquisition of commercial items; and to add a new clause on Gray Market Items to ensure that new medical equipment and associated services and support for VA Medical Centers are purchased from Original Equipment Manufacturers (OEM) or their authorized distributors and resellers. In VAAR part 813, this final rule adds language to reference the applicability of the VFCP in contracts awarded using Simplified Acquisition Procedures; to require contracting officers to use the Vendor Information Pages (VIP) database to confirm Service-Disabled Veteran-Owned Small Business (SDVOSB) and Veteran-Owned Small Business (VOSB) status; and to add language in VAAR part 813

that emphasizes that contracting officers can use other than competitive procedures under specified circumstances when awarding to SDVOSBs and VOSBs. VA had proposed removing the language at 813.202, Purchase guidelines, and to replace it with proposed text at 813.203, Purchase guidelines, to comport with the numbering and arrangement of the FAR. VA is removing the current text contained in 813.202 as described in the Technical Non-Substantive Changes to the Proposed Rule section.

This final rule includes changes as a result of public comments, minor formatting and/or grammatical edits, as well as Federal Register administrative format changes in the amendatory text which result in no substantive changes at the affected sections.

There were five respondents that submitted public comments. There were 15 separate comments submitted by these 6 respondents. Because there was redundancy in terms of the comments submitted, VA has separated the comments and responses into 9 distinct issues and themes for clarity. A discussion of the issues raised in the comments as well as the changes made to the rule as a result of those comments are provided as follows:

1. Positive Feedback on the Proposed Rule

A respondent commends VA for its thoughtful development of this rule and of the agency's overarching goal of revising and streamlining the VAAR. They believe that SDVOSBs and VOSBs, as well as VA contracting officers, will benefit from the clarity this rulemaking provides regarding the applicability of the Veterans First Contracting Program policy and VAAR provisions to VA acquisition of commercial items. They also

commend VA for removing some unnecessary or duplicative provisions and for adding a VAAR provision to make clear when “gray market” items are not permitted.

VA appreciates the feedback from these commenters on the VA’s overarching goal to streamline the VAAR. VA is also pleased the commenters support overall the revisions to VAAR parts 812 and 813.

2. Clarification of the VA Acquisition of Commercial Items Clauses

One commenter raised the issue that the proposed provision, 852.212-70, Provisions Applicable to VA Acquisition of Commercial Items, and the clause, 852.212-71, Contract Terms and Conditions Applicable to VA Acquisition of Commercial Items, may be confusing and proposes that VA consider combining them into one list for clarity and consistency.

VA has reexamined the proposed clause and provision, and agrees that combining the previously proposed separate clause and provision into one clause will eliminate unnecessary duplication when it must be included in both solicitations and in contracts, BPAs and orders. Accordingly, section 812.301 has been amended to reflect the updated prescription, numbering and title for the new combined clause, 852.212-70, Provisions and Clauses Applicable to VA Acquisition of Commercial Items, and the renumbered remaining clause originally prescribed in this section, now 852.212-71, Gray Market Items. VA has also updated the list of unique VA solicitation provisions and contract clauses that contracting officers can apply to solicitations and contracts for the acquisition of commercial items based on current prescribed provisions or clauses and current VA practice.

3. Concerns about Gray Market Items, Pass-Through Entities and High Tech Medical Equipment

A commenter expressed concern with business entities which do not possess the clinical and technical knowledge of high tech medical equipment and supporting ancillary services and acting as a “pass-through” entity. The commenter expresses concern that such “pass-through” entities will have a negative effect on the delivery of quality patient care and services to VA Medical Centers if such business entities are allowed to participate in VA procurements. The commenter believes that new medical equipment for VA Medical Centers should be purchased from an OEM or its authorized dealer, distributor, or reseller. The commenter also expressed concern that allowing set-asides for firms that are not manufacturers (i.e., nonmanufacturers) may create potential pass-throughs.

VA is always concerned with the fidelity and quality of equipment purchased to support Veterans healthcare. VA believes the inclusion of clause 852.212-71, Gray Market Items, will appropriately address the use of authorized Original Equipment Manufacturer (OEM) distributors or resellers. Policy governing the SBA nonmanufacturer rule and limitations on subcontracting requirements are covered in the FAR and other parts of the VAAR and permit the use of businesses that comply with those regulations. We are making no changes to this rule based on this comment.

4. Potential Conflicts Between the Proposed Rule, VA's Veterans Small Business Regulations at 38 CFR Part 74 and the SBA's Regulations on Government Contracting Programs at 13 CFR Part 125

One commenter provided comments in response to both the proposed rule under this case, and proposed changes to VA's Veterans Small Business Regulations at 38 CFR part 74, published January 10, 2018 in the Federal Register (83 FR 1203). The commenter states that "a Veteran-Owned Small Business (VOSB)/Service-Disabled Veteran-Owned Small Business (SDVOSB) must be verified by the VA's Center for Verification and Evaluation (CVE) and listed in the Vendor Information Pages (VIP) database in order to be eligible for set-aside contract awards in the VA. This eligibility continues for 3 years unless there are circumstances which require the business to exit the program as outlined in 38 CFR 74.21. One of those circumstances is failure to maintain its eligibility for program participation. Presumably, when a VOSB/SDVOSB finds that it is no longer small for a particular NAICS code for which it is registered, it is also no longer eligible to be listed in VIP for that NAICS code and will be removed. This appears to be in conflict with the Small Business Administration (SBA) policy."

VA will not revise VAAR part 812 or 813 based on this comment. Title 38 U.S.C. 8127 requires a firm must be listed as verified in the VA database to be eligible to receive an award under the VFCP. This comment is beyond the scope of this rule as it mostly applies to certification and verification requirements under the VA's Veterans Small Business Regulations at 38 CFR part 74, published January 10, 2018 in the Federal Register (83 FR 1203) and which became effective October 1, 2018 (83 FR 48221). Note that a new SBA regulation related to SDVOSB certification also became

effective on the same date. The changes in both SBA and VA regulations comply with the directive in the National Defense Authorization Act of 2017 (Pub. L. 114-328), section 1832, to standardize definitions for SDVOSBs and VOSBs between VA and SBA. As required by section 1832, the Secretary of Veterans Affairs will use SBA's regulations to determine ownership and control of SDVOSBs and VOSBs. The Secretary would continue to determine whether individuals are Veterans or service-disabled Veterans and would be responsible for verification of applicant firms. Challenges to the status of an SDVOSB or VOSB based upon issues of ownership or control would be decided by the administrative judges at the SBA's Office of Hearings and Appeals (OHA).

The commenter also provided comments indicating that SDVOSB/VOSB verification and representation requirements should not apply to orders. The commenter argued that requiring the verification of SDVOSB/VOSB status at the order level would be in conflict with the SBA regulations which do not require verification at the task order level for certain types of contracts. The commenter believes that the proposed VAAR conflicts with that SBA policy. In effect, the commenter submits, that while the SBA rules may allow an SDVOSB that has “organically outgrown” its size to compete for orders under an IDIQ for up to 5 years without recertifying its status or size (unless the [contracting officer] CO requests it), VA’s Veterans First Contracting Program requires “recertification” within 30 days of a business outgrowing its size by removing it from the VIP database (which must be checked by the CO prior to task order award). Furthermore, the commenter believes that “it may be argued that the VA rule is tantamount to eliminating the CO’s discretion to ask for recertification at the task order

level by requiring the CO to, effectively, ask for a recertification for every task order by checking VIP”. Another commenter argued the opposite. The second commenter believes that VA should revise VAAR 813.003-70 to make clear that the Veterans First Contracting Program mandate and the requirement to confirm SDVOSB or VOSB status apply to task orders. However, they recommend VA follow the SBA guidance on small business representation. They also believe that replacing “prior to award” with “at the time of award” would provide more clarity on the specific point of time at which VA judges SDVOSB and VOSB eligibility.

We are unable to make the overall recommended changes due to VA’s statutory mandate. The Veterans First Contracting Program (VFCP) applies to all contracts, BPAs and orders under this part. VA legislation is very clear that only small businesses listed in the VA database of eligible firms (the Vendor Information Pages or VIP) can be awarded a contract under the VFCP. The Supreme Court confirmed this requirement and issued a decision in 2016 that for purposes of the program, an order is a contract. Therefore, verifying VIP eligibility shall occur both at the time of submission of offers and prior to award for contracts and orders is consistent with the current VAAR 819.7003 class deviation issued on July 25, 2016. A future VAAR case for part 819 will further examine the issue of “prior to award” or “at time of award.”

5. Use of the Veterans First Contracting Program (38 U.S.C. 8127-8128) as an Authority for the Proposed Rule

One of the commenters objected to the use of 38 U.S.C. 8127-8128 as an authority citation in parts 812 and 813. The commenter requested an explanation to why

this specific statute is included in a document that explicitly excludes internal guidance on processes and procedures. The commenter believes it is inappropriate to include the statute by reference at a time when many questions regarding guidance, applicability, and impact are unanswered.

We are making no change to VAAR part 812 or 813 based on this comment. The inclusion of the authority is appropriate because many of the issues addressed in these parts are based on the unique and special requirements imposed by legislation and statute and make it necessary to include the referenced citation.

6. Applicability of the Veterans First Contracting Program in the Proposed Rule

A commenter indicated that the proposed policy at VAAR 813.003-70 references contracts as defined in FAR 2.101, but does not explicitly reference task orders. To avoid confusion, the commenter recommends that VA revise VAAR 813.003-70(a) to include a reference to orders.

VA notes that orders are part of the definition of contracts as set forth in FAR 2.101, Definitions. However, to ensure clarity to the specific types of actions covered under VAAR part 813, we are revising 813.003-70, Policy, to indicate that the VFCP applies to contracts, orders and BPAs under this part. We also added a reference to FAR part 13 to indicate that the VFCP takes precedence over the small business programs referenced in FAR part 13, and references to 819 which includes additional information regarding compliance with the VFCP.

One commenter requested that VA include the use of a fixed percentage figure to define "fair and reasonable" in the context of the VA Rule of Two. They also believe that

the nonmanufacturer rule should be waived to allow Veteran small businesses the ability to compete.

We are making no change to VAAR part 812 or 813 based on this comment. How to conduct a price analysis and establishing a fair and reasonable price is already addressed in the FAR. Specifically, FAR subpart 15.4, Contract Pricing, provides guidance to contracting officers to assist in making a fair and reasonable determination. Additional internal agency guidance would be contained in the VA Acquisition Manual. However, VA acknowledges this is an area of interest for the public as well as VA's acquisition workforce. VA is preparing additional internal training for its acquisition workforce to strengthen and refresh contracting officer's skillsets in this area.

Regarding the nonmanufacturer rule and Veteran small businesses, VA will continue to comply with SBA regulations. VA legislation requires VA to use the small business definitions and requirements in the Small Business Act, where not in conflict with VA's unique statutory authority and 38 U.S.C. 8127-8128. This includes the application of the nonmanufacturers rule. The nonmanufacturer rule is a requirement in the Small Business Act as implemented by the SBA under 13 CFR 121.401 through 121.413 and applies to all Federal procurement programs for which status as a small business is required or advantageous.

A commenter applauds VA for addressing the SDVOSB/VOSB sole source option in its regulations. The commenter believes that the sole source requirement in this section is consistent with the legislation, but believes it is not consistent with those in VAAR subpart 819.70, as a result of restrictions added to VAAR 819.7007 and 819.7008 through a class deviation implementing the program as a result of the

Kingdomware Supreme Court Decision. The commenter believes that the legislation does not impose requirements on when or how to use the sole source authority and that VA should make clear that its contracting officers need not do more than what is set forth in VAAR 813.106-70(c) to make sole source awards to SDVOSBs and VOSBs above the simplified acquisition threshold. The commenter requests that VA go so far as to encourage the award of sole source contracts when certain conditions are met. The commenter suggested revision language to VAAR 813.106-70(c).

VA concurs that the VA legislation provides a unique sole source authority that is less restrictive than a sole source award otherwise permitted under FAR 6.302-1, “Only one responsible source and no other supplies or services will satisfy agency requirements.” VA does not concur, however, with the latter part of the commenter’s analogy that a sole source is acceptable under any circumstance or that the use of sole source contracts should be encouraged. Consistent with the FAR, VA encourages the use of competitive procedures for all its procurements to the maximum extent practicable.

Therefore, VA declines to make changes to the language as suggested but will add a FAR reference in VAAR 813.106-70(b) and (c) that contracts awarded using the VA legislative authority shall be conducted as authorized by FAR 6.302-5 and in accordance with 819.7007 and 819.7008, and to remove redundant language in the remaining paragraph that is covered in the referenced sections and is also applicable under part 813. This language is consistent with the legislative mandate, FAR and the language in VAAR subpart 819.70, as provided in the July 25, 2016, VAAR Class Deviation—Implementation of the Veterans First Contracting Program as a Result of the

U.S. Supreme Court Decision (Class Deviation—Veterans First Contracting Program (VFCP 2016)).

One commenter stated that to make the statutory priority clear, VAAR 813.003-70(c) should state that, under 38 U.S.C. 8127, contracts shall be set aside for SDVOSBs when market research provides a reasonable basis for receiving two or more offers from SDVOSBs. The commenter believes the proposed VAAR 813.003-70, paragraph (c) does not make the statutory priority clear, and paragraph (c)(1), as proposed, says only that “contracts under this part shall be set aside for SDVOSBs or VOSBs, when supported by market research.”

The commenter also recommended VA revise VAAR 813.003-70(c)(2), VAAR 852.212-70, and VAAR 852.212-71 to make clear the priorities for SDVOSBs, and then VOSBs applies to all commercial items acquisitions except for SDVOSB set-asides. The commenter stated in their opinion that VA has appropriately recognized in VAAR 813.003-70(c)(2) that the first priority is for SDVOSBs and second priority for VOSBs and applies to procurements that are not set-aside for SDVOSBs or VOSBs. The commenter believes that VAAR 813.003-70(c)(2) does not go far enough because VAAR 852.215-70 should be inserted into any solicitation, except those that are set-aside for SDVOSBs. The commenter further asserts that requiring insertion of VAAR 852.215-70 into all solicitations except for SDVOSB set-asides is the only way to ensure that contracting officers develop an appropriate means (such as full/partial credit) to implement the statutory mandate to prioritize award of contracts to SDVOSBs first, then VOSBs second, before all other small businesses, and finally large businesses.

The intent of the language at VAAR 813.003-70(c) is to highlight the requirement that set-asides are mandatory and that if a set-aside is not feasible, then evaluation preferences should be used in accordance with 815.304-70. Any prescription changes to clauses 852.215-70 or -71 will be addressed in a separate VAAR case and is not appropriate to make such changes to VAAR part 812 or 813 at this time. While VA concurs that SDVOSBs have priority over VOSBs in every instance, the evaluation preference prescribed in this section provides recognition to the requirement in 38 U.S.C. 8128 that small business concerns owned and controlled by veterans have a priority over other small businesses. The priority of SDVOSBs over VOSBs is well established, including at VAAR 813.003-70(c)(2). Therefore, the language remains unchanged and any further clarification of the language would be addressed in a future VAAR rulemaking case with VAAR part 819.

Additionally, references to the VFCP program are included in the section to set forth that the Veterans First Contracting Program developed pursuant to the authority in 38 U.S.C. 8127-8128 applies to both commercial acquisitions and procurements under the simplified acquisition threshold at the VA.

7. Market Research

A commenter noted the importance of reinforcing, especially for delivery of patient care and services procurements for Veterans Affairs Medical Centers (VAMCs), that robust market research be conducted, and that set-asides and awards be determined in accordance with those findings.

VA agrees that market research including industry engagement are key elements in the decision-making process for any acquisition. It is VA's intention to comply with all legislative and legal requirements, including VFCP, while providing the best care and maximum resources to address the needs of the Veteran community we serve. VA is in the process of releasing other parts dealing with competition, acquisition planning and market research. They will be published in the Federal Register for public comment once the appropriate approvals are obtained. Accordingly, no language will be changed in the rule based on these comments.

8. Training of the VA Acquisition Workforce on this Proposed Rule

A commenter would like to know how and when contracting officers, staff, and local Veterans Affairs Medical Centers (VAMCs) will be trained on these revised requirements. The commenter recommends VA release an implementation plan and deadline for each phase of the large-scale VAAR revision. Currently, no implementation date is listed in the Federal Register notice.

VA also supports the importance of training as highlighted by our investment in training for the acquisition workforce at the VA Acquisition Academy (VAAA). Training on various VAAR revised policy and procedures, as well as internal agency guidance, is currently being provided on an ongoing basis through the VAAA, as well as local and national conferences and other training events as necessary. We continue to update and revise internal training material to address VA acquisition workforce needs and will continue to ensure appropriate training is scheduled and accomplished on both a one-time or recurring basis as the topics and needs may dictate. VA continues to publish

proposed rules for public comment in phased increments and is working closely with the Office of Small and Disadvantaged Business Utilization (OSDBU) to address concerns of the small business community, in particular SDVOSBs and VOSBs. VA submits updates to its planned regulatory agenda two times a year. Any updates and new planned regulatory actions concerning specific VAAR parts will be published there. The case containing the proposed rule for VAAR part 819, including the Veterans First Contracting Program under subpart 819.70, and key affected parts is planned for publication in the Federal Register for public comment in 2019.

9. Removal of Internal Procedural Guidance from the VAAR

A commenter inquired if VA anticipates the need to develop and issue specific procurement policy memorandums, directives, handbooks, and standard operating procedures given the removal of internal procedural guidance from the VAAR. The commenter also questioned the timely issuance of information and updates to internal procedural manuals.

VA is currently updating its acquisition policies and regulations. As each part is completed, any internal documents that require updating would be updated to comport with the new regulations. The VA Acquisition Manual will incorporate many of the related internal procedural guidance at the VA-wide level and will be published on the VA OAL/PPS website when any new VAAR parts are published as effective in the Federal Register. Any additional internal policy and procedures at various levels and activities in the VA are being examined and will be appropriately updated or created, as needed.

Technical Non-Substantive Changes to the Proposed Rule.

1. Under section 813.003-70(a), this final rule adds a reference to FAR part 13 in conjunction with FAR part 19 as a more accurate reference; and in paragraph (d) changes a reference from FAR part 19 to the Small Business Administration (SBA) regulations at 13 CFR part 121 and 13 CFR 125.6 to provide clarity.

2. In the proposed rule, VA intended to remove 813.202, Purchase guidelines, include a new section 813.203, and add revised language at 813.203, Purchase guidelines, to comport with the FAR. VA is removing the guidance from the VAAR and may place the guidance in the VAAM. As a part of this final rule, VA will remove the current section 813.202 and take no action on proposed 813.203.

3. This final rule revises the VAAR part 852 authorities to reflect the authorities recently codified in a previous rule.

4. Under 813.307, VA proposed to remove the section which references the use of forms and move mention of forms as internal VA guidance to the VA Acquisition Manual. The forms referenced in 813.307 which will be removed with this final rule, are both referenced, and in some cases, were prescribed at 853.213 as well. With the removal of 813.307 in this final rule, the forms require removal from the VAAR as well, so with this final rule, section 853.213 will be removed and any of the noted forms if and when still used at VA, are available on VA's public facing website at <https://www.va.gov/vaforms/> or upon request from any VA contracting office.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments or on the private sector.

Paperwork Reduction Act

This rulemaking impacts two existing information collection requirements associated with two Office of Management and Budget (OMB) control numbers. The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number.

Although this action contains provisions constituting collections of information at 48 CFR part 813, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or revised collections of information are associated with this final rule. The information collection requirements for 48 CFR part 813 are currently approved by OMB and have been assigned OMB control number 2900-0393.

Although this final rule removes 813.307, Forms, with this action 853.213, Simplified acquisition procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and

348), will also be removed as the forms now shown in the text at 853.213 are also referenced within section 813.307, making their continued inclusion in VAAR part 853 unnecessary. In particular, one of the forms referenced at 813.307(f), VA Form 10-2421, Prosthetic Authorization for Items or Services, and at 853.213(d), has an associated OMB Control Number although it is not currently associated with the VAAR. Under the provisions of Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or revised collections of information are associated with this final rule. The information collection requirements for VA Form 10-2421 are currently approved by OMB and have been assigned OMB control number 2900-0188 under the administrative management of the Veterans Health Administration. This form will no longer be referenced in the VAAR and its OMB control number is not now associated with the VAAR.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). This rulemaking does not change VA's policy regarding small businesses, does not have an economic impact to individual businesses, and there are no increased or decreased costs to small business entities. On this basis, the final rule would not have an economic impact on a substantial number

of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm> by following the link for "VA Regulations Published from FY 2004 Through Fiscal Year to Date." This final rule is not subject to the requirements of E.O. 13771 because this final rule is expected to result in no more than *de minimis* costs.

List of Subjects

48 CFR Parts 812, 813, and 853

Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela Powers, Chief of Staff, Department of Veterans Affairs, approved this document on March 2, 2020, for publication.

Consuela Benjamin,
Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 48 CFR parts 812, 813, 852, and 853 as follows:

PART 812—ACQUISITION OF COMMERCIAL ITEMS

1. The authority citation for part 812 is revised to read as follows:

Authority: 38 U.S.C. 8127-8128; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

Subpart 812.1—Acquisition of Commercial Items—General

2. Section 812.102 is revised to read as follows:

812.102 Applicability.

3. Section 812.102-70 is added to subpart 812.1 to read as follows:

812.102-70 Applicability of Veterans preferences.

Based on the authority under 38 U.S.C. 8127 and 8128, the Veterans First Contracting Program in subpart 819.70 applies to VA contracts under this part. The provisions and clauses prescribed reflect agency unique statutes applicable to the acquisition of commercial items.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

4. Section 812.301 is revised to read as follows:

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(1) Contracting officers shall insert the clause 852.212-70, Provisions and Clauses Applicable to VA Acquisition of Commercial Items, in all

solicitations and contracts for commercial acquisitions and check only those provisions and clauses that apply to the individual acquisition.

(2) Contracting officers shall insert the clause 852.212-71, Gray Market Items, in solicitations and contracts for new medical equipment for VA Medical Centers and that include FAR provisions 52.212-1, Instruction to Offerors—Commercial Items, and 52.212-2, Evaluation—Commercial Items.

812.302 [Removed]

5. Section 812.302 is removed.

PART 813—SIMPLIFIED ACQUISITION PROCEDURES

6. The authority citation for part 813 is revised to read as follows:

Authority: 38 U.S.C. 8127-8128; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

7. Section 813.003-70 is added to read as follows:

813.003-70 Policy.

(a) The Veterans First Contracting Program in subpart 819.70 applies to VA contracts, orders and BPAs under this part and has precedence over other small business programs referenced in FAR parts 13 and 19.

(b) Notwithstanding FAR 13.003(b)(2), the contracting officer shall make an award utilizing the priorities for veteran-owned small businesses as implemented within the VA hierarchy of small business program preferences, the Veterans First Contracting Program in subpart 819.70. Specifically, the contracting officer shall consider preferences for verified service-disabled veteran-owned small businesses (SDVOSBs)

first, then preferences for verified veteran-owned small businesses (VOSBs). These priorities will be followed by preferences for other small businesses in accordance with FAR 19.203, and 819.7004.

(c) When using competitive procedures, the preference for restricting competition to verified SDVOSBs/VOSBs in accordance with paragraph (b) of this section is mandatory whenever market research provides a reasonable expectation of receiving two or more offers/quotes from eligible, capable and verified firms at fair and reasonable prices that offer best value to the Government.

(1) Pursuant to 38 U.S.C. 8127, contracts under this part shall be set-aside for SDVOSBs/VOSBs, in accordance with 819.7005 or 819.7006 when supported by market research. Contracting officers shall use the applicable set-aside clause prescribed at 819.7009.

(2) Pursuant to 38 U.S.C. 8128 and to the extent that market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall include evaluation factors as prescribed at 815.304 and the evaluation criteria clause prescribed at 815.304-71(a).

(d) The SDVOSB and VOSB eligibility requirements in 819.7003 apply, including verification of the SDVOSB and VOSB status of an offeror, and other small business requirements in 13 CFR part 121 and 13 CFR 125.6 (e.g., small business representation, nonmanufacturer rule, and subcontracting limitations).

Subpart 813.1—Procedures

8. Section 813.102 is added to subpart 813.1 to read as follows:

813.102 Source list.

Pursuant to 819.7003, contracting officers shall use the Vendor Information Pages (VIP) database to verify SDVOSB/VOSB status.

9. Revise section 813.106 to read as follows:

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

813.106-3 [Removed]

10. Section 813.106-3 is removed.

11. Section 813.106-70 is revised to read as follows:

813.106-70 Soliciting competition, evaluation of quotations or offers, award and documentation—the Veterans First Contracting Program.

(a) When using competitive procedures under this part, the contracting officer shall use the Veterans First Contracting Program in subpart 819.70 and the guidance set forth in 813.003-70.

(b) Pursuant to 38 U.S.C 8127(b), contracting officers may use other than competitive procedures to enter into a contract with a verified SDVOSB or VOSB for procurements under the simplified acquisition threshold, as authorized by FAR 6.302-5.

(c) For procurements above the simplified acquisition threshold, pursuant to 38 U.S.C. 8127(c), contracting officers may also award a contract under this part to a firm verified under the Veterans First Contracting Program at subpart 819.70, using procedures other than competitive procedures, as authorized by FAR 6.302-5 and in accordance with 819.7007 and 819.7008.

Subpart 813.2 [Removed and Reserved]

12. Subpart 813.2 is removed and reserved.

Subpart 813.3—Simplified Acquisition Methods

813.302 [Removed]

13. Section 813.302 is removed.

813.302-5 [Removed]

14. Section 813.302-5 is removed.

15. Section 813.305-70 is added to subpart 813.3 to read as follows:

813.305-70 VA's imprest funds and third party drafts policy.

VA's Governmentwide commercial purchase card and/or convenience checks shall be used in lieu of imprest funds and third party drafts.

813.307 [Removed]

16. Section 813.307 is removed.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

17. The authority citation for part 852 is revised to read as follows:

Authority: 38 U.S.C. 8127-8128, and 8151-8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

Subpart 852.2—Texts of Provisions and Clauses

18. Section 852.212-70 is added to read as follows:

852.212-70 Provisions and Clauses Applicable to VA Acquisition of Commercial Items.

As prescribed in 812.301(f)(1), insert the following clause to indicate provisions and clauses applicable to this acquisition:

PROVISIONS AND CLAUSES APPLICABLE TO
VA ACQUISITION OF COMMERCIAL ITEMS (APR 2020)

(a) The Contractor agrees to comply with any provision or clause that is incorporated herein by reference or full text to implement agency policy applicable to acquisition of commercial items or components. The following provisions and clauses that have been checked by the Contracting Officer are incorporated by reference or in full text. Text requiring fill-ins is shown under the clause or provision title:

___ 852.203-70, Commercial Advertising.

___ 852.209-70, Organizational Conflicts of Interest.

___ 852.214-71, Restrictions on Alternate Item(s).

___ 852.214-72, Alternate Item(s).

Bids on [*Contracting Officer will insert an alternate item that is considered acceptable*] will be given equal consideration along with bids on [*Contracting Officer will insert the required item and item number*]** and any such bids received may be accepted if to the advantage of the Government. Tie bids will be decided in favor of [*Contracting Officer will insert the required item and item number*].

(End of provision)

___ 852.214-73, Alternate Packaging and Packing.

___ 852.214-74, Marking of Bid Samples.

___ 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

___ 852.215-71, Evaluation Factor Commitments.

___ 852.216-71, Economic Price Adjustment of Contract Price(s) Based on a Price Index.

___ 852.216-72, Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index.

___ 852.216-73, Economic Price Adjustment—State Nursing Home Care for Veterans.

___ 852.216-74, Economic Price Adjustment—Medicaid Labor Rates.

___ 852.216-75, Economic Price Adjustment—Fuel Surcharge.

___ 852.219-9, VA Small Business Subcontracting Plan Minimum Requirements.

___ 852.219-10, VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside.

___ 852.219-11, VA Notice of Total Veteran-Owned Small Business Set-Aside.

___ 852.222-70, Contract Work Hours and Safety Standards Act—Nursing Home Care Contract Supplement.

___ 852.228-70, Bond Premium Adjustment.

___ 852.228-71, Indemnification and Insurance.

___ 852.228-72, Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds.

___ 852.229-70, Sales and Use Taxes.

___ 852.232-72, Electronic Submission of Payment Requests.

___ 852.233-70, Protest Content/Alternative Dispute Resolution.

___ 852.233-71, Alternate Protest Procedure.

___ 852.237-7, Indemnification and Medical Liability Insurance.

___ 852.237-70, Contractor Responsibilities.

The Contractor shall obtain all necessary licenses and/or permits required to perform this work. He/she shall take all reasonable precautions necessary to protect persons and property from injury or damage during the performance of this contract. He/she shall be responsible for any injury to himself/herself, his/her employees, as well as for any damage to personal or public property that occurs during the performance of this contract that is caused by his/her employees fault or negligence, and shall maintain personal liability and property damage insurance having coverage for a limit as required by the laws of the State of ___ [*Insert name of State*]. Further, it is agreed that any negligence of the Government, its officers, agents, servants and employees, shall not be the responsibility of the Contractor hereunder with the regard to any claims, loss, damage, injury, and liability resulting therefrom.

(End of clause)

___ 852.246-70, Guarantee.

The Contractor guarantees the equipment against defective material, workmanship and performance for a period of ___ [*Normally, insert one year. If industry policy covers a shorter or longer period, i.e., 90 days or for the life of the equipment, insert such period.*], said guarantee to run from date of acceptance of the equipment by the Government. The Contractor agrees to furnish, without cost to the Government, replacement of all parts and material that are found to be defective during the guarantee period. Replacement of material and parts will be furnished to the Government at the point of installation, if installation is within the continental United States, or f.o.b. the continental U.S. port to be designated by the Contracting Officer if installation is outside of the continental United States. Cost of installation of replacement material and parts shall be borne by the contractor. [*The above clause will be modified to conform to standards of the industry involved.*]

(End of clause)

___ 852.246-71, Inspection or Alternate I.

___ 852.246-72, Frozen Processed Foods.

___ 852.246-73, Noncompliance with packaging, packing, and/or marking requirements.

___ 852.270-1, Representatives of Contracting Officers.

___ 852.270-2, Bread and Bakery Products—Quantities.

___ 852.270-3, Purchase of Shellfish.

___ 852.271-72, Time Spent by Counselee in Counseling Process.

___ 852.271-73, Use and Publication of Counseling Results.

___ 852.271-74, Inspection.

___ 852.271-75, Extension of Contract Period.

___ 852.273-70, Late Offers.

___ 852.273-71, Alternative Negotiation Techniques.

___ 852.273-72, Alternative Evaluation.

___ 852.273-73, Evaluation—Health-Care Resources.

___ 852.273-74, Award without Exchanges.

(b) When appropriate and in accordance with the prescriptions for the clause, the contracting officer may use the following clause in requests for quotations, solicitations, and contracts for the acquisition of commercial items if the contracting officer determines that the use is consistent with customary commercial practices:

___ 852.211-70, Service Data Manuals or Alternate I.

(c) All requests for quotations, solicitations, and contracts for commercial item services to be provided to beneficiaries must include the following clause at

___ 852.271-70, Nondiscrimination in Services Provided to Beneficiaries.

(End of clause)

19. Section 852.212-71 is added to read as follows:

852.212-71 Gray Market Items.

As prescribed in 812.301(f)(2), insert the following provision in solicitations and contracts for new medical equipment:

GRAY MARKET ITEMS (APR 2020)

(a) No gray market or remanufactured items will be acceptable. Gray market items are Original Equipment Manufacturers' (OEM) goods sold through unauthorized channels in direct competition with authorized distributors. This procurement is for new OEM medical equipment only for VA medical facilities.

(b) Vendor shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM. All software licensing, warranty and service associated with the equipment/system shall be in accordance with the OEM terms and conditions.

(End of clause)

PART 853—FORMS

20. The authority citation for part 853 is revised to read as follows:

Authority: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301 through 1.304.

853.213 [Removed]

21. Section 853.213 is removed.

[FR Doc. 2020-05589 Filed: 3/24/2020 8:45 am; Publication Date: 3/25/2020]